No. 12131

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE HOUSING EXPEDITER,

Appellant,

vs.

SYDNEY MARK TAPER, HARDING MANOR, INC., WARDLOW HEIGHTS, INC., and WARDLOW ANNEX, INC.,

Appellees.

APPELLEES' REPLY BRIEF.

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RESPONDENTS' REPLY BRIEF.

Statutes and Regulations Involved.

The pertinent provisions of the applicable statutes and regulations appear in the appendix of appellant's opening brief and additional quotations therefrom will appear in the body of appellees' brief.

Statement of the Facts.

The statement of facts in appellant's brief is substantially correct and summarizes the matters contained in the record. The defendants were the owners of five single-

family residences referred to in plaintiff's complaint which were tenant-occupied. On or about June 3, 1948, the appellees served each of the tenants with notices under Section 209(a)(5) of the Housing and Rent Act of 1947 as amended requiring the tenants to vacate the premises. The notices further stated that the landlord sought in good faith to recover possession of the housing accommodations for the immediate purpose of withdrawing them from the rental market. The notices further provided that the housing accommodations would not thereafter be offered for rent as such. The facts were undisputed.

Three separate actions were brought by the Housing Expediter pursuant to Section 206 of the act to restrain and enjoin the appellees from evicting the tenants.

Appellant cites the order of Judge Pierson M. Hall on his application for a preliminary injunction at some length at pages 5 and 6 of his brief as though the proceedings were in fact contested or constituted a final decision. The order of Judge Hall on the preliminary injunction was likewise cited by the appellant in many other cases throughout the country evidently as a final determination. It appears that the emphasis placed by appellant on that order may have mislead counsel and the courts. This will be more particularly referred to in appellees' brief hereafter.

As a matter of fact and as the record will show [R. 46], the papers were served in this case on appellee, Taper, on a Friday evening shortly after the appellee had

returned to his office after being away for more than two weeks. The hearing was set for the following Monday morning. Due to inadvertence, the short notice, and the facts more particularly set forth in the record, the appellees failed to make any appearance either personally or by counsel [R. 19].

After the service of the notices to vacate aforesaid, two of the tenants, namely, Alvin L. Fite and Henry Monkiewicz, voluntarily vacated the premises [R. 131, Findings of Fact 5]. The remaining three tenants vacated by October 25, 1948.

Appellees' motion for summary judgment was granted, findings of fact and conclusions of law were made by the court and the decree was entered pursuant thereto in favor of the appellees [R. 136-139] on October 13, 1948, among other things decreeing that the appellees have the right to evict the tenants in possession of the property described in the complaint on the ground that the appellees desire in good faith to recover possession of the housing accommodations for the immediate purpose of withdrawing them from the rental market. The decree provided that the housing accommodations shall not hereafter be offered for rent as such. It also required that if the appellant should sell any of the properties set forth in the complaint, then the agreement of sale shall provide that the purchaser will not place the premises on the rental market to be used as housing accommodations so long as they are subject to that restriction by law.

SUMMARY OF ARGUMENT.

I.

The case turned upon the interpretation to be placed upon Section 209(a)(5) of the Housing and Rent Act of 1947, as amended, which provides for eviction of tenants where the landlord seeks in good faith to recover possession for the immediate purpose of permanently withdrawing the housing accommodations from the rental market.

The answer to this problem really determined the case. A reading of appellant's extensive brief indicates that this is the controlling issue.

It is submitted that Section 209(a) specifies eight *independent* grounds for eviction of tenants. Section 209 (a)(5) is clear and unambiguous. It requires nothing further than an actual reading of its language. Appellant's extensive brief is merely occasioned by one fact, namely, that he wishes to detract from the plain, simple and unambiguous language of the section. Appellant seeks to change the crystal clear language of the section by administrative construction and is attempting to have this Honorable Court indulge in judicial legislation.

II.

The amendment of March 1949, of the Housing and Rent Act of 1947 and specifically Section 825.6 of the Housing Expediter's regulation issued on April 1, 1949, particularly Sub-section (H)(2), exempts this action from the March 1949, amendment. The judgment permitting the removal of the tenants was entered by decree of the court below on October 13, 1948, which was prior to the controlling effective date of April 1, 1949 [See R. 138].

III.

There was no genuine issue as to any material facts to be tried and the motion granting appellees' summary judgment was proper under Rule 56 of the Federal Rules of Civil Procedure.

ARGUMENT.

I.

The Trial Court Properly Held That a Landlord May Recover Possession of Housing Accommodations for the Immediate Purpose of Permanently Withdrawing Them From the Rental Market in Accordance With Section 209(a)(5) of the Act.

The language of the section is clear beyond any controversy. It does not require any interpretation; it merely requires a reading. Any layman could read Section 209 (a)(5) and give its meaning without hesitation. The only reason why this interpretation resolves itself into an extensive and lengthy one is that appellant seeks to go beyond the clear language of the Act to *interpret* or *construe* it to mean something other than that which it clearly states.

(a) The Plain Language of Section 209(a)(5).

Referring to appellant's brief, Point Ia, pages 11 to 20, it is respectfully submitted that it is difficult to see what argument is necessary other than a reading of Section 209(a)(5) in order to determine what is the plain language of that section. Appellant at page 12 has set forth the section verbatim and it is submitted that its reading alone will determine the issue.

It is a general rule of law that requires little citation of authority that if the words of a statute given their ordinary and popular signification are reasonably free from ambiguity and uncertainty, the court will look no further to ascertain its meaning even though it may appear probable that a different object was in the mind of the legislature. The legislature's intention and meaning must be

determined primarily from the language of the statute itself.

Magnano Co. v. Hamilton, 64 S. Ct. 599, 292 U. S. 40, 78 L. Ed. 1109.

The intention of Congress is to be sought for primarily in the language used and when the language expresses an intention reasonably intelligible and plain, it must be accepted without modification by resort to construction or conjecture.

Gorin v. U. S., 111 F. 2d 712, 61 S. Ct. 429, 312 U. S. 19, 85 L. Ed. 488.

It has been held that if Congress has made a choice of language which fairly brings a given situation within a statute, it is unimportant that the particular application may not have been contemplated by the legislators.

Barr v. U. S., 65 S. Ct. 522, 324 U. S. 83, 89 L. Ed. 765.

The language of the section is clear. If the landlord intends in good faith to immediately withdraw the housing accommodations from the rental market and such housing accommodations shall not thereafter be offered for rent as such, he is entitled to obtain possession from his tenants. The landlord is assuming a definite obligation in using this section in that he must see to it that the housing accommodations shall not thereafter be offered for rent as such. That is his responsibility and though it is burdensome, it is not for the appellant to say that it is too burdensome and therefore prevent the appellees from the use of this section.

It is respectfully submitted that appellant has mislabeled his argument in his brief, pages 11 to 20, when he states

that portion of his argument is in support of the plain language of Section 209(a)(5). None of the arguments advanced by appellant in this section of his brief has any bearing upon what the plain language of the section states.

Counsel will reply to appellant's argument in the order given in his brief.

1. At pages 11 to 15 of appellant's brief, it is stated that the plain meaning of Section 209(a)(5) of the Act does not permit the construction given by the trial court in this action. Appellant's argument is that it is impracticable and difficult for the landlord to comply with the provisions of the Act and therefore, and actually, the plain meaning of the section should not be given full force and effect. Admittedly that is a burdensome obligation which the landlord undertakes, but it has nothing to do with the plan language of the section.

Reference was heretofore made to the fact that the case at bar was cited as authority prior to judgment by the appellant in a number of other cases in other jurisdictions. The court's attention is respectfully referred to page 13 of appellant's brief, particularly the case of *Property Service Company v. Spicknall,* decided in the People's Court of Baltimore City, the opinion of which is set forth at page 83 of appellant's brief. It will be noted that at page 87 of appellant's brief wherein the opinion is set forth in full, the case at bar is the only case relied upon by the court. Evidently counsel for the appellant in the herein action cited the order on the uncontested preliminary injunction made by Judge Hall without awaiting a final determination on the merits of the case. Certainly the case of *Property Service Company v. Spicknall,* rely-

ing completely on the uncontested preliminary injunction granted in the case at bar, before judgment, cannot now be considered as authority for this case. It appears from the opinion of the case in *Property Service Company v. Spicknall, supra,* that the court therein was not advised that this was a preliminary order, that it was uncontested and that a judgment on the merits had not been granted. It is reasonable to assume if that case would have come up subsequent to the judgment entered herein in favor of appellees on their motion for summary judgment, the opinion would be the reverse.

2. At page 16 of this brief, appellant states that the court imposed certain conditions in its decree as an ". . . adequate substitute for the letter of the law . . ."

Appellant devotes ten pages of his brief, from pages 11 to 20, to argue what the letter of the law, that is Section 209(a)(5), really states. It is respectfully submitted that the only argument that is required in this regard is to set forth the section verbatim for this Honorable Court to read. The language is crystal clear. However, in view of the mental gymnastics of appellant in its lengthy argument as to what the plain language of the section is, appellees have discussed the matter at greater length than would otherwise be necessary.

It is submitted that the landlord who wishes to remove his tenant for the purpose of permanently withdrawing the property from the rental market, is not required to proceed under 209(a)(3) if he sells his property at some later date. The appellant cannot insist that he first obtain a purchaser and proceed under Section 209(a)(3). Each of the grounds for eviction set forth in Section 209(a) of the Act are independent, nor can it be said

that Section 209(a)(3) of the Act is the only one that a landlord can use if he ultimately intends to make a sale regardless of his immediate purpose of permanently withdrawing the housing accommodations from the rental market.

3. It is difficult to see how appellant's argument under its sub-head 3, pages 19 and 20 of its brief, in any way affects the case at bar. Appellant states at page 19 of its brief:

> "If we accept appellee's theory that a landlord may evict for his purposes of sale regardless of the restrictions contained in sub-section 5, then by token of the same reasoning, a landlord need not also comply with the 65% requirement of sub-section 2."

(Appellee's argument is in reference to the curbing of a "cooperative housing racket.")

It is difficult to see how appellant can so mis-state appellees' position; nor has there been any contention in the case up to this point that the facts herein had any connection whatsoever with a "co-operative housing racket." This argument must have been in error.

Appellee's position is that so clearly stated by the language of Section 209(a)(5). A landlord who chooses Section 209(a)(5) to evict and remove a tenant must act in good faith and his immediate purpose must be to withdraw the housing accommodations from the rental market. In addition, the landlord undertakes the obligation that such housing accommodation shall not thereafter be offered for rent as such. The fact that this is a burdensome obligation is of no concern to the appellant. A violation of this section would invoke the penalties provided by the act. As long as the housing accommodations are perma-

nently withdrawn from the rental market the act has been complied with, and by way of illustration and without limitation, the landlord could thereafter do any of the following things with his property:

A. Keep the housing accommodations vacant.

B. Convert and rent as a commercial structure.

C. Remodel, redecorate and renovate the property and thereafter, if he so chooses, sell the property. In such event, he must take precautions not to allow the housing accommodations to be placed on the rental market as such thereafter.

D. Use the housing accommodations as storage space.

E. Demolish the premises.

F. After withdrawing the housing accommodations from the rental market, he may choose to reside on the premises.

(b) The Attempted Construction of Section 209(a)(5) by Appellant Violates the Most Elementary Principles of Statutory Construction.

Appellant refers to "the most elementary principles of statutory construction," but yet by attempting to justify its position, it tries to read into the plain meaning of the section what the legislative intention should have been and not what the clear and unambiguous language of Section 209(a)(5) plainly states.

The most primary and elementary rule in construing statutes is to ascertain and give effect to legislative intention, but that intention and meaning must be determined from the language of the statute itself. When the language expresses an intention reasonably intelligible and

plain, it must be accepted without modification by resort to construction or conjecture.

McLeod v. Nagel, 48 F. 2d 189;
Magnano Company v. Hamilton, supra;
Gorin v. U. S., supra.

Since Congress has made a choice of language which fairly brings a given situation within the statute, it is unimportant that the particular application may not have been contemplated by the legislators.

Barr v. U. S., supra.

The argument of appellant that Section 209(a)(3) is the only one that can be used by a landlord in the event that at any future or distant time a sale is made of the property is without merit. The reading of the sections involved is sufficient to indicate that they cover different situations. Could it be seriously urged that a landlord would be in violation of the Act if he proceeded under section 209(a)(4) substantially remodelled the housing accommodations and long thereafter sold the premises? Similarly it cannot be argued as appellant does in its brief at page 21, that sub-section (5) was intended to repeal the provisions of sub-section (3) if appellees' construction of sub-section (5) is adopted. It is specious reasoning for appellant to state that the trial court's ruling results in a repeal by implication of sub-section (3) or sub-section (2). Each of the sub-sections obviously serves a different purpose.

The language of the United States Court of Appeals for the Third Circuit, in the case of *Woods v. Durr,* 170

F. 2d 976 (C. C. A. 3rd), states the applicable law as follows:

"It is the plaintiff's contention that paragraph (3) of Section 209(a) is the only paragraph of that section which permits eviction for the purpose of sale and that it is not applicable because the defendant admittedly has not entered into a written contract to sell the premises to any specific purchaser. The defendant on the other hand urges that paragraph (5) of Section 209(a) permits the eviction proceeding which she has instituted. She asserts that since she seeks in good faith to recover possession for the immediate purpose of withdrawing her property permanently from the rental market she comes within the express terms of paragraph (5) and that her purpose for doing so is immaterial so long as it involves the permanent withdrawal of the property from the rental market. In answer to this contention the plaintiff concedes, as indeed he must, that the language of paragraph (5) is broad enough to cover the defendant's case but contends that the generality of this language must be limited to cases not covered by the other paragraphs of Section 209(a). Among the other paragraphs he points to paragraph (3) which relates specifically to sales and he says that the two paragraphs must be construed in harmony with each other and accordingly paragraph (5) must be read as not applicable to the recovery of possession for the purpose of sale."

". . . On the contrary the case is one for the application of the basic rule that where the language of a statute is plain and unambiguous there is no occasion for construction and it must be taken to mean what it clearly says. That, we think, is the case here.

"Moreover we do not see any inconsistency between paragraph (5) as applied by the district court in this case and paragraph (3). While they may at times overlap, the reach of the two paragraphs is quite different."

". . . It will thus be seen that paragraph (3) applies only to contracted sales of a property and involves no bar to its subsequent renting while paragraph (5) applies to any sort of withdrawal of a property from the rental market, whether for purposes of sale or otherwise, when the withdrawal is to be permanent."

". . . What such a landlord proposes to do with his accommodations is wholly immaterial provided he understands and intends in good faith that they shall not, at least so long as Section 209(a)(5) of the Act remains in force, again be offered for rent as housing accommodations whether by him or any subsequent owner."

(c) The Construction of the Act by the Trial Court Is Governed by the Most Elementary Principles of Statutory Construction, That the Plain Language of Section 209(a)(5) Governs. This Construction Does Not Thwart Effective Rent Control.

Appellant's argument under this point merely finds fault with the Act as enacted by Congress. Appellant speaks of the "field day" that speculators enjoy and their ability to "make a killing" under the plain language of Section 209(a)(5). This is merely a matter of conjecture on appellant's part. Appellant states that a landlord may obtain a higher price for his accommodations when vacant which is admittedly true. However, would he obtain a

higher price if there is a further condition that so long as Section 209(a)(5) of the Act remains in force the property cannot again be offered for rent as housing accommodations. Appellant states unequivocally, as a matter of business judgment, that a sale made under such circumstances would bring a higher price than a sale to a purchaser with a tenant in possession and without such restriction permanently withdrawing the housing accommodations from the rental market. The mere statement of this business problem is sufficient to indicate that the most astute real estate owners and operators could not give such an unequivocal answer to the question covering all situations as appellant so blithely does in his brief, particularly at pages 26 and 27.

Once again, appellant relies on the case of *Property Service Company v. Spicknall, supra,* which was followed by *Fox v. Robertson* in the same court. Both of these cases are based upon the order of Judge Hall made after the default hearing of the appellant's petition for a preliminary injunction and prior to the judgment rendered herein. Evidently since the case of *Fox v. Robertson* was decided on January 11, 1949, which was approximately three months subsequent to the judgment rendered herein, it appears that appellant has not corrected his records in submitting briefs on this point in other jurisdictions; or in any event, he has not advised other courts of the judgment now existing in the herein action. (See App. Br. p. 81.)

(d) The Construction Given to Section 209(a)(5) by the Trial Court Is Contrary to the Expediter's Administrative Interpretation, but That Interpretation Being in Direct Conflict With the Plain Terms of the Statute, Is of No Effect Whatsoever.

The statement in *Woods v. Durr, supra,* hereafter following, answers appellant's contention in this regard completely:

> "For the reasons given we cannot agree with the contrary limited interpretation placed upon paragraph (5) by the plaintiff in his Housing and Rent Memorandum No. 51 upon which he now strongly relies. The power to issue regulations which Section 204(d) of the Act conferred upon him was limited to Sections 202(c) and 204 and did not extend to evictions, the subject of Section 209. The interpretation is, therefore, in no sense binding upon us and since it is in conflict with both the statutory language and the Congressional intent we cannot follow it."

(e) The Legislative History Further Supports the Trial Court's Interpretation of Section 209(a)(5).

On page 31 of Appellant's Brief, it is stated:

> "In *Woods v. Durr, supra,* the court reached the conclusion that 'the legislative history of subsection (5) supports the literal construction that a landlord may resort to Section 209(a)(5) to evict tenants for purposes of sale.'"

Appellees have examined the opinion in *Woods v. Durr, supra,* carefully and do not find any such language. There

is a quote from the case which ends with the word "supports," but the remainder of the so-called quote from the case of *Woods v. Durr* was probably set forth by appellant in his brief at page 31 in error.

As long as the landlord intends in good faith to withdraw the housing accommodations from the rental market so long as Section 209(a)(5) of the Act remains in force and that is his immediate purpose, he has complied with the section.

It is submitted that the remarks of the court in *Woods v. Durr, supra,* setting forth the legislative references merely bolster the opinion that the clear language of the section should be given effect without resort to administrative detraction.

(f) Taylor v. Bowles, 145 F. 2d 833 (E. C. A.), Supports the Decree of the Trial Court.

Appellant seeks to limit the effect of *Taylor v. Bowles, supra,* in some fashion but it is difficult to see any real difference in fact or in principle.

As stated in *Woods v. Durr, supra,* as follows:

> "In Taylor v. Bowles, 145 F. 2d 833 (E. C. A. 1944), the Emergency Court of Appeals placed a broad construction upon Section 4(d) of the Emergency Price Control Act, holding that under its provisions a landlord might withdraw his housing accommodations from the rental market merely because of dissatisfaction with the existing maximum rents.

> We think that the almost identical provisions of Section 302 of the Housing and Rent Act of 1948 and the complementary provisions of Section 209(a)(5), which that act added to the Housing and Rent Act of 1947, must be given an equally broad interpretation in accordance with their plain language in order to carry out the Congressional intent to avoid any constitutional difficulty."

In closing the argument on this issue appellees wish to call the court's attention to page 41 of Appellant's Brief as follows:

> "To sum up the issues: The construction which the Court below gave to the Act is contrary to the plain language used; . . ."

It is submitted that the language of the section is so clear that it is difficult to believe that appellant is serious in this contention.

II.

The Housing and Rent Act of 1947 as Amended in 1949 and the Regulations Issued Thereunder Effective April 1, 1949, Do Not Require Appellees to Apply to the Housing Expediter for a Certificate of Eviction.

The 1949 amendment to the Housing and Rent Act of 1947 and the regulation issued thereunder dated April 1, 1949, being Section 825.6, and particularly Paragraph (H)(2) excepts the appellees from the necessity of obtaining a certificate of eviction. That section of the regulation above quoted provides in part as follows:

> "(2) The provision of this section shall not apply to any case in which judgment was entered prior to April 1, 1949, by a court of competent jurisdiction for the eviction or removal of a tenant from housing accommodations."

On October 13, 1948, the appellees were determined by the decree of the trial court to: ". . . have the right to evict tenants in possession of the property described in the complaint herein . . ." [R. 138.]

In addition, the five tenants involved have all vacated said premises, the last on October 25, 1948, and the first two, being Alvin L. Fite and Henry Monkiewicz, vacated prior to the entry of the judgment [Findings of Fact No. 5, R. 131] and thus it would be impossible to apply for any certificate for their eviction.

III.

The Motion for Summary Judgment Was Properly Granted.

There was no genuine issue as to any material fact and appellees were entitled to summary judgment under Rules of Civil Procedure, Section 56(c). An examination of the contentions of appellant in regard to this point indicates no real issue as to any material fact exists. Appellees contended, as pointed out at page 49 of Appellant's Brief, that their acts were not in violation of the Housing and Rent Act of 1947 as amended. A question of law was involved. There was no real issue of fact and no such contention was seriously made. It was simply a question as to whether the acts complained of did or did not constitute violations of Section 209(a)(5) of the Housing and Rent Act of 1947 as amended.

For the reasons stated above, it is respectfully submitted that the judgment of the trial court should be affirmed.

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